IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 11 Case
	)	Number 89-10440
EVERGREEN FOODS, INC.	)	
	)	
Debtor-in-Possession	)	
	)	
THOMAS J. LIPTON, INC.	)	FILED
	)	at 4 O'Clock & 46 min. P.M.
Movant	)	Date: 3-9-90
	)	
vs.	)	
	)	
EVERGREEN FOODS, INC.	)	
	)	
Respondent	)	

ORDER

On January 19, 1990, Thomas J. Lipton, Inc. ("Lipton"), by and through its counsel, filed a motion to intervene and for extension of time within which to file a proof of claim in this Chapter 11 proceeding. The debtor, Evergreen Foods, Inc., filed a response opposing the motion. Based upon the stipulations of counsels, pleadings on file, briefs submitted and argument at hearing, this court makes the following findings of fact and conclusions of law.

This proceeding was commenced by the filing on March 29, 1989, of an involuntary Chapter 7 petition by entities claiming to be creditors of the debtor. After initially resisting the petition,

the debtor voluntarily converted the case to a Chapter 11 proceeding. Lipton was not listed as a creditor by the debtor. However, Lipton was aware of this Chapter 11 case prior to the bar date of October 25, 1989 for the filing of proofs of claim. At hearing the debtor stipulated that it would not object to the allowance of a proof of claim by Lipton for One and No/100 ($1.00) Dollar which

could later be amended. Lipton has not filed or attempted to file a proof of claim. Presently, Lipton is not a creditor in this proceeding.

The debtor lists as an asset of the estate a cause of action for the recovery of a fraudulent conveyance or alternatively preferential transfer to Lipton. The alleged fraudulent conveyance or preferential transfer from the debtor to Lipton is now the subject of an adversary proceeding filed December 29, 1989, Evergreen Foods and William A. Green, Jr. v. Thomas J. Lipton Co., Adv. Pro. No. 89-1097 (Bankr. S.D. Ga. 1989), which basically asserts that on January 24, 1989, the debtor compromised a pending lawsuit, Evergreen Foods v. Thomas J. Lipton, Inc. No. CV180-0055 (S.D. Ga. 1988), for Five Hundred Thousand and No/100 ($500,000.00) Dollars resulting in the debtor receiving less than a reasonably equivalent value in exchange for the compromise. According to the debtor this is a liquidation Chapter 11 and the only remaining potential source of recovery for the creditors is the adversary proceeding against Lipton. There were at least two (2) other preference actions filed. Both have been settled, with one settlement approved by this court and approval of the other settlement pending.

Lipton does not require an order of this court under Bankruptcy Rule 3003(c)(3)[1] extending the time for filing of a proof of claim. The only basis for a right to recovery in this Chapter 11 proceeding on behalf of Lipton would be as a result of the pending adversary proceeding. If there is a determination in the adversary proceeding that a transfer occurred for less than reasonable equivalent value at a time when the debtor was insolvent or rendered insolvent by the transfer, 11 U.S.C. §548(a)(2)[2] , then

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[1]Bankruptcy Rule 3003(c)(3) provides:

> (3) Time for filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interests may be filed.

[2]11 U.S.C. §548(a)(2) provides:

> (a) The trustee may avoid any transfer of an

the debtor, as debtor-in-possession acting with the powers of a trustee would recover for the benefit of the estate the value of such property, 11 U.S.C. §550(a)[3], subject to any lien granted to Lipton to the extent of the value given by Lipton if Lipton is determined to be a good faith transferee, 11 U.S.C. §548 (C)[4]. If

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interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

2(A) received less than a reasonably equivalent value in exchange for such transfer or obligations; and

(B)(i) was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction or was about to engage in business or a transaction, for which any property remaining with the debtor was of unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur debts that would be beyond the debtor's ability to pay as such debts matured.

[3]11 U.S.C. §550(a) provides:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

(1) The initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) Any immediate or mediate transferee of such initial transferee.

[4]11 U.S.C. §548(c) provides:

(c) Except to the extent that a transfer or

available, the lien created in favor of Lipton would be against the

recovery against Lipton to the maximum possible sum of Five Hundred Thousand and No/100 ($500,000.00) Dollars, the value given by Lipton.

If the adversary proceeding succeeds in avoiding a transfer and the recovery under 550 results in the creation of claim due Lipton, the claim shall be allowed or disallowed as if it were a prepetition claim. 11 U.S.C. §502(h)[5], 124 Cong. Rec. H11,094 (daily ed. Sept. 28, 1978); S17,411 (daily ed. Oct. 6, 1978) (remarks of Rep. Edwards and Sen. DeConcini).

> The reach of section 550 is to avoidance made by the trustee . . . under section 548 dealing with avoidable fraudulent transfers . . . Thus section 502(h), by incorporating the provisions of section 550, has within its scope claims arising from the recovery of property pursuant to the exercise by the trustee of avoidance powers given him by [section 548] described in section 550.

3 Collier on Bankruptcy ¶502.08 6 (L. King 15th ed. 1989).

Any claim arising on behalf of Lipton from the successful prosecution of

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> obligation voidable under this section is voidable under 544, 545 or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interests transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

[5]11 U.S.C. §502(h) provides:

> A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

the adversary proceeding by the debtor is provided for under 502(h) and an extension of time to file a claim under Bankruptcy Rule 3003(c)(3) is unnecessary.

Lipton is not a party in interest in this case. See, 11 U.S.C. §1109(b)[6]. At this point in this case, as there has been no determination under sections 547 or 548 that a preferential or fraudulent transfer has occurred and no lien has arisen in favor of Lipton. As there has been no determination under section 547 or 548, there can be no recovery by the estate under 550 which could create a claim by Lipton. As Lipton is not a party in interest, the only basis for its participation in this Chapter 11 proceeding is pursuant to Bankruptcy Rule 2018.[7] This rule refers to a party having an interest in a proceeding rather than a party in interest. A party in interest as a matter of right under §1109 may be heard where as this rule authorizes the court to allow other parties which may have an interest in a proceeding to be heard. By its terms, the rule is permissive and within the discretion of the court. In re:

Hyde Park Partnership, 73 B.R. 194 (Bankr. N.D. Ohio 1986). Intervention will

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[6]11 U.S.C. §1109(b) provides:

> (b) A party in interest including the debtor, the trustee, a creditors committee, an equity security holders' committee, a creditor, an equity security holder, or any indentured trustee may raise and appear to be heard on any issue in a case under this chapter.

[7]Bankruptcy Rule 2018 provides:

> (a) Permissive intervention. In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.

be permitted upon the showing of cause based upon an economic or similar interest in the case or one of its aspects. 8 Collier on Bankruptcy ¶2018.03 (L. King 15th ed. 1989). The movant bears the burden of setting forth grounds for intervention. In re: Zyndorf, 44 B.R. 77 (Bankr. N.D. Ohio 1984).

At this stage of this Chapter 11 proceeding Lipton is merely the holder of a contingent interest in the outcome. But for the pending adversary proceeding seeking to set aside a compromise between Lipton and the debtor, Lipton would have no interest whatsoever in this case. Until the adversary proceeding is resolved Lipton has no claim and has no interest in this proceeding other than to disrupt the debtor's progress toward confirmation in order to bring an end to the adversary proceeding. Clearly, to allow Lipton to intervene would unduly delay the progress of the Chapter 11 case to the prejudice of the parties in interest, especially the creditors whose only available source for payment is a successful resolution of the adversary proceeding on behalf of the estate.

The court must balance the potential for delay and prejudice to the parties in interest against the potential for prejudice to the intervenor. Obviously, the interests of Lipton are adverse to those of all other parties in interest in this proceeding and its participation in the Chapter 11 process would cause significant delay to the prejudice of the other parties. Lipton is not prejudiced by denying intervention as its rights are adequately protected in the adversary proceeding under applicable bankruptcy rules. Lipton has responded to the adversary proceeding and asserted counterclaims which have been responded to by the debtorin-possession. Once the adversary is resolved, the status of Lipton as a potential lienholder and claimant in this Chapter 11 ca~se will be resolved. Should a claim arise, 502(h) provides adequate protection for Lipton within the Chapter 11 case. Lipton has failed to carry the burden of establishing a for cause basis for permissive intervention under Bankruptcy Rule 2018.

It is therefore ORDERED that the motion of Thomas J. Lipton, Inc. for an extension of time in which to a file proof of claim and to intervene pursuant to Bankruptcy Rule 2018 is denied. To the extent that this order differs from the

findings set forth by this court on the record at the close of the hearing on this matter, the findings of this order take precedence.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 9th day of March, 1990.